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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

KENNETH DAMON,

Petitioner,

vs.

STATE OF CONNECTICUT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment's Confrontation Clause prohibits the use of an autopsy report at a state murder trial when the pathologist who conducted the autopsy and prepared the report does not testify.

2. Whether the Connecticut Supreme Court's refusal to apply Fourth Amendment standards to the Petitioner's station-house confession violated the rule of *Dunaway v. New York*.

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PETITION FOR A WRIT OF CERTIORARI

Kenneth Damon, Petitioner, requests that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court entered March 6, 1990.

OPINION BELOW

The opinion of the Connecticut Supreme Court is officially reported at 214 Conn. 146 (1990). It is reproduced in the Appendix to this Petition beginning at App. p. A-1.

A timely motion to reargue was denied by the Connecticut Supreme Court on April 12, 1990. That order is reproduced in the Appendix to this Petition beginning at App. p. B-1.

JURISDICTION

The judgment of the Connecticut Supreme Court, affirming Petitioner's conviction of murder, was entered on March 6, 1990. A timely motion to reargue was filed with the Connecticut Supreme Court and denied by that Court on April 12, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part: "Nor shall any State deprive any person of life, liberty or property without due process of law. . . ."

2. The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

3. The Fourth Amendment to the United States Constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . but upon probable cause. . . ."

4. Section 53a-54a of the Connecticut General Statutes provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person. . . ."

5. Section 52-180 of the Connecticut General Statutes provides in relevant part: "(a) Any writing or record . . . made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the acts, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter. (b) The writing or record shall not be rendered inadmissible by (1) A party's failure to produce as witnesses the person or persons who made the writing or record, or who have personal knowledge of the act, transaction, occurrence or event recorded or (2) The party's failure to show that such persons are unavailable as witnesses."

STATEMENT OF THE CASE

The Petitioner Kenneth Damon was convicted of the September, 1987, murder of Monica Joyner and sentenced to a term of life imprisonment. The victim's body was found in a pool of blood in the laundry area of the basement of the building in which both she and Petitioner's mother rented apartments. The exact time of death, the location and significance of stab wounds in the body, and the nature and extent of bleeding prior to death

all were important issues during the trial, at which the Petitioner presented an alibi defense. Although these details were of great importance, the pathologist who had conducted the autopsy was vacationing in India at the time of trial and was not expected back for two weeks. The trial court rejected Petitioner's motion for an adjournment pending the pathologist's return and permitted the State to introduce the autopsy report instead.

Upon learning of the Petitioner's connection to the crime scene, New Haven police officers confronted him at his place of employment and told him they needed to question him in connection with a murder investigation. He agreed to their request that he accompany them to New Haven police headquarters for this purpose. Because Petitioner worked in another town, he was unable to leave New Haven police headquarters except if provided transportation in a police vehicle. He was taken into the police building through a non-public entrance and upon arrival was given his *Miranda* warnings. He refused to sign a written waiver and denied any involvement in the murder. He was then interrogated incommunicado for almost five hours. His mother, who contacted the police and requested to speak with him, was denied access to him. He was never told that he had a right to leave. Finally, "shaking and crying," and asserting that he was afraid his mother would be arrested if he did not confess, Petitioner admitted stabbing the victim.

Both the trial court and the Connecticut Supreme Court found that there had been no probable cause to arrest the Petitioner or to take him into custody. Both held, however, that he had not been arrested and was not

in custody at the time of his confession and that, therefore, Fourth Amendment standards did not apply.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE CONFRONTATION CLAUSE PROHIBITS THE USE OF THE "BUSINESS RECORDS" HEARSAY EXCEPTION TO AVOID IN-COURT TESTIMONY BY IMPORTANT PROSECUTION WITNESSES WHOSE PRESENCE CAN BE OBTAINED WITHOUT UNDUE HARDSHIP OR INCONVENIENCE TO THE GOVERNMENT.

The autopsy testimony in this case was not routine, but was extremely important to the defense case. The nature and extent of knife wounds in the victim's body, the nature and extent of bleeding and particularly of projectile bleeding, and the exact time of death all were closely related to the alibi defense presented. It was crucial for the defendant to establish that he would not have had time to commit this murder and cleanse himself before reporting for work at the times he was able to demonstrate he had done.

At the start of trial, the State expressly represented to the Court that the pathologist who had performed the autopsy would be testifying as a prosecution witness. Only the day of her scheduled testimony was it revealed for the first time that she was in India and would not return for two weeks. The Court refused to delay the trial and permitted the use of an autopsy report under the

"business records" exception to the hearsay rule over timely objection.

"[M]yopic insistence upon expeditiousness in the face of a justifiable request for a delay can render the right to defend with counsel an empty formality." *Chandler v. Fretag*, 348 U.S. 3 (1954).

Of all the rights protected by the Bill of Rights, the right to physically confront one's accusers in open court on an eyeball-to-eyeball basis is among the most central. *Coy v. Iowa*, ___ U.S. ___, 108 S.Ct. 2798 (1988). Only when the prosecution is able to demonstrate either the unavailability of the declarant or that the "utility of trial confrontation [is] remote," can the right of confrontation be denied. *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980). In the present case, the State made no effort whatever to establish that it had made any effort of any kind to obtain the presence of its witness at trial. In fact, Dr. Shaw was and is a full-time employee of the State of Connecticut and her availability was obvious.

Even if the State had been able to demonstrate that Dr. Shaw was unavailable, her statement would not have been admissible unless it carried with it adequate "indicia of reliability . . . widely viewed as determinative of whether a statement may be placed before a jury though there is no confrontation of the declarant," *Dutton v. Evans*, 400 U.S. 74, 89 (1970), and sufficient to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." *California v. Green*, 399 U.S. 149, 161 (1930). *Cf. Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972). In this instance, the critical nature of the evidence presented and the highly subjective nature thereof made this the

very kind of hearsay the admission of which violates the Confrontation Clause. *See Pickett v. Bowen*, 798 F.2d 1385 (11th Cir. 1986) (medical report in a sexual assault case); *United States v. McClintock*, 748 F.2d 1278 (9th Cir. 1984) (business record concerning the quality of gemstones); *United States v. Bernard S.*, 795 F.2d 749 (9th Cir. 1986); *United States v. Keplinger*, 776 F.2d 678, 696 (7th Cir. 1985).

II

CERTIORARI SHOULD BE GRANTED TO PROTECT THE JUDICIAL SYSTEM FROM THE USE OF CONFESSIONS OBTAINED BY THE EXPLOITATION OF FOURTH AMENDMENT VIOLATIONS.

In this case, the state courts held that there was no point prior to the Petitioner's stationhouse confession at which there existed any probable cause to take him into custody. The State of Connecticut does not dispute that holding. The Connecticut Supreme Court held, however, that the Petitioner was not in custody at the time of his confession and, therefore, the absence of probable cause was irrelevant.

In so holding, the Connecticut courts have evaded this Court's rulings in *Brown v. Illinois*, 422 U.S. 590 (1975), and *Wong Sun v. United States*, 371 U.S. 471 (1963), and have violated the rule of *Taylor v. Alabama*, 457 U.S. 687 (1982), and *Dunaway v. New York*, 442 U.S. 200 (1979).

It is well-settled that a confession which is the product of an unlawful arrest or detention must be excluded from evidence not so much for the protection of the accused as for the protection of the integrity of the judicial system. *Wong Sun, supra; Brown, supra.* It is equally

well-established that the police may not detain a suspect for custodial interrogation without probable cause in the hope that "something will turn up." *Dunaway, supra; Taylor, supra.*

While in every case it is a unique fact determination whether the accused was "in custody" for Fourth Amendment purposes, *Sibron v. New York*, 392 U.S. 40, 67 (1968), any interrogation is custodial "if, in view of all the circumstances surrounding the incident a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980).

In this case, the Petitioner was confronted by three armed police officers at his place of employment and told that they wished to question him about a murder. He was taken in a police vehicle from the town where he was employed to the headquarters of the New Haven Police Department, entering via a private underground entrance. He was taken by elevator to the detective division and there given his *Miranda* warnings. He was constantly in the presence of one or more police officers from shortly before 8:00 p.m. until about midnight, when he finally confessed. During that time, his mother attempted to speak with him but she was denied any opportunity to do so. The Petitioner repeatedly insisted upon his innocence during this time, but he was not released. None of these facts is in dispute. It is inconceivable under such circumstances that any reasonable person would have thought he was free to leave police headquarters. The holding by the Connecticut Supreme Court in this regard is nothing less than a transparent attempt to evade the repeated rulings of this Court. If the rule of law is to have any

meaning in this context, certiorari must be granted on this issue.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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No. _____

In The

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KENNETH DAMON,

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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Decision of Supreme Court, State of Connecticut v. Kenneth Damon, 214 Conn. 146 (March 6, 1990) A-1

APPENDIX B

Order on Motion for Reargument or Reconsideration (April 12, 1990) B-1

STATE OF CONNECTICUT *v.* KENNETH DAMON
(13672)

PETERS, C. J., SHEA, COVELLO, HULL and SANTANIELLO, Js.

Convicted of the crime of murder, the defendant appealed to this court challenging the trial court's denial of his motion to suppress, as the fruit of an illegal arrest made without probable cause, certain inculpatory statements he had made to the police. He further challenged the trial court's admission into evidence of the report of an autopsy performed on the victim. The report was admitted under the business record exception to the hearsay rule, through the testimony of a pathologist who was not present when the autopsy was performed. *Held:*

1. The trial court's conclusion that the defendant's contact with the police was voluntary and that he had not been seized or arrested prior to the time he made the inculpatory statements was supported by substantial evidence.

2. The defendant could not prevail on his claim that his constitutional rights to confrontation, compulsory process and due process were violated by the trial court's admission of the autopsy report; an autopsy report is essentially a factual report limited to objective physical observations and, as such, contains sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating its truth.

3. The trial court did not abuse its discretion in denying the defendant's request for a continuance until the pathologist who had performed the autopsy on the victim could be called to testify or until he could retain his own pathologist to examine the autopsy report.

Argued December 13, 1989 – decision released March 6, 1990

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Purtill, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *No error.*

Mark Rademacher, for the appellant (defendant).

Geoffrey E. Marion, deputy assistant state's attorney, with whom, on the brief, was *Michael Dearington,* state's attorney, for the appellee (state).

COVELLO, J. The defendant, Kenneth Damon, appeals from his conviction of murder in violation of General Statutes § 53a-54a(a).[1] The dispositive issues are: (1) whether the trial court erred in denying the defendant's motion to suppress inculpatory statements made by the

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[1] "[General Statutes] Sec. 53a-54a. MURDER DEFINED. AFFIRMATIVE DEFENSES. EVIDENCE OF MENTAL CONDITION. CLASSIFICATION. (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

defendant to the police; and (2) whether the trial court violated the defendant's constitutional rights of confrontation, compulsory process and due process when it admitted an autopsy report into evidence, under the business record exception to the hearsay rule. We find no error.

The jury could reasonably have found the following facts: On September 9, 1987, Monica Joyner was found stabbed to death in the basement of a three family dwelling in New Haven. The victim lived on the second floor with her husband and two young children. The first floor apartment was occupied by Prisilla Damon, the defendant's mother. Prisilla Damon lived alone, but the defendant occasionally stayed overnight at her apartment. The defendant worked the noon to eight p.m. shift at Bozzuto's Trucking Company in Cheshire. On the night of September 8, 1987, Prisilla Damon picked up the defendant at Bozzuto's, and at midnight they returned to her apartment, where the defendant planned to spend the night.

At approximately 11:15 a.m. on September 9, Mitchell Stevenson, the owner of the building, left his third floor apartment and walked down into the basement, and there discovered the victim lying face down in a pool of blood on the basement floor. The victim's clothing was in partial disarray. The victim had suffered multiple stab wounds to her upper body, head and face.

On the afternoon of September 9, Prisilla Damon went to the New Haven police station and gave a statement indicating that the defendant had been at her apartment that morning. Two plainclothes detectives,

Francisco Ortiz and Leroy Dease, drove to Bozzuto's, where the defendant was working. The detectives asked the defendant if he would voluntarily accompany them to the New Haven police station to be interviewed in connection with a homicide they were investigating. The detectives informed the defendant that he was not under arrest, that he did not have to accompany them, and that he was free to leave if he chose to. The defendant agreed to accompany the detectives.

The defendant was taken to the detective division and given *Miranda*[2] warnings. The defendant was not handcuffed, was not told that he was under arrest, and was not told that he was a suspect. The defendant never requested that he be allowed to go home.

Between 9 and 9:30 p.m. the detectives began questioning the defendant in a conference room.[3] The defendant initially denied any knowledge of the victim or her death. After several hours of questioning, however, at approximately 12:15 a.m. on September 19, the defendant

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[2] *Miranda v. Arizona*, 384 U.S 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[3] The record reveals that the defendant was taken to the police station in an unmarked car driven at normal speeds, without the emergency lights or siren. The car entered the police station via an underground parking garage, which was the normal entrance into the building for detectives. The defendant was taken by public elevator to the detective division on the third floor, and then to the conference room. The conference room contained windows, and during the course of the defendant's interview the detectives were in and out of the room. The door of the conference room remained open during the course of the interview.

gave a tape recorded confession in which he admitted killing the victim.[4] The defendant claimed that he had acted in self-defense. He stated that the victim, while "high" on drugs, had knocked on the back door of his mother's apartment at approximately 9:30 a.m. and had asked him for some cocaine. He further stated that the victim took a knife from his mother's kitchen, then lured him down the basement, where she attacked him with the knife. The defendant stated that during the ensuing struggle he accidentally stabbed the victim. The defendant told the police that he had wrapped the knife in a brown paper bag and had thrown it into a garbage can in front of the Dixwell Plaza shopping area.[5]

The defendant was thereafter charged in a substitute information with murder, in violation of General Statutes § 53a-54a(a). On May 24, 1988, the defendant filed a motion to suppress the statements he had made to the

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[4] At approximately 9:30 p.m., Detective Ortiz left the conference room, leaving the defendant and Detective Dease alone. Approximately thirty minutes later Detective Anthony DiLullo entered the conference room. Shortly after DiLullo's entrance, the defendant started shaking and crying. The defendant then admitted to the police that he had stabbed the victim. The defendant then agreed to make a taped statement of his version of the stabbing.

[5] Approximately three days later, Nathan Collins, a maintenance worker, found a butcher knife wrapped in a brown paper bag while he was mowing the lawn at the Dixwell Plaza. Collins threw the knife into a dumpster and the police were unable to recover it. When the police visited Prisilla Damon on September 10 and inquired if she was missing any knives, she noticed that a butcher knife she usually kept near her sink was missing.

police. In his motion to suppress, the defendant claimed that his statements were made without a voluntary, knowing and intelligent waiver of his constitutional privilege against self-incrimination, and that the statements were made involuntarily in violation of his constitutional rights to due process.

On November 29, 1988, the day before the trial began, the trial court conducted a suppression hearing and thereafter denied the motion to suppress. The trial court concluded that while there was no probable cause to arrest the defendant up until the time he made the inculpatory statements, the defendant had voluntarily accompanied the police to New Haven, had voluntarily remained at the police station, and was not in police custody at the time he made his incriminating statements. The trial court further found that the defendant's statements were made with full knowledge of his *Miranda* rights.

On December 1, 1988, at the start of the trial, the state represented to the court that Malka B. Shah, the pathologist who performed the autopsy on the victim, was in India and was not expected back "for some period of time." The state explained that it intended to call another pathologist from the same office, Ira Kanfer, who could properly interpret and explain the findings contained in the report.

The defendant objected to the admission of the autopsy report through Kanfer and requested three alternative rulings from the trial court. First, he requested that the court preclude Kanfer from testifying. Second, the defendant requested that the court grant a continuance

until Shah returned from India. Third, the defendant requested that the court, if it denied the first two requests, grant a continuance so that he could retain his own pathologist to examine the autopsy report. Upon inquiry, the trial court established that Shah had taken a three month vacation and would not be back for two weeks. The trial court overruled the defendant's objections and denied the requests for a continuance. The trial court ruled that the autopsy report would be admissible as a business record, regardless of Shah's availability, if a proper foundation were laid and Kanfer could explain the report.

Upon inquiry by the trial court, defense counsel stated that he had obtained a copy of the autopsy report "two months or so before this case started." The trial court concluded that there had been ample opportunity to review the report and to retain a pathologist to explain it from the defendant's standpoint.

Dr. Kanfer then testified for the state. Kanfer limited his testimony to explaining the terms used in the autopsy report and describing the victim's wounds as noted therein. He testified that the autopsy report was a standard report made by the person who performed the autopsy, that it was a report made in the regular course of business at the medical examiner's office, that it was the regular course of business after making the report to keep it on file at the medical examiner's office, and that the report was made soon after the autopsy was completed.

The state offered the autopsy report as a full exhibit and the defendant objected. The trial court concluded that a sufficient foundation had been laid and admitted

the autopsy report. Kanfer then testified briefly concerning the four fatal stab wounds and the cause of death reiterating the opinions of Shah as contained within the report.

On December 7, 1988, the jury found the defendant guilty as charged. The defendant immediately filed a motion for judgment of acquittal and a motion for a new trial. The trial court denied both motions. On February 24, 1989, the defendant was sentenced to a prison term of sixty years. The defendant thereafter filed a direct appeal from that judgment with this court, pursuant to § 51-199(b)(3).[6]

I

The defendant's first claim is that the trial court erred in denying the defendant's motion to suppress his inculpatory statements on the ground that he was arrested without probable cause and that therefore, the statements must be suppressed as the fruit of an illegal arrest. The gravamen of the defendant's claim is that he was in the custody and complete control of the police prior to and during the interview, and he was therefore "seized" and under arrest for constitutional purposes. The defendant alleges that because no probable cause existed at that

[6] General Statutes § 51-199 provides in pertinent part: "(b) The following matters shall be taken directly to the supreme court . . . (3) an appeal in any criminal action involving a conviction for a capital felony, class A felony, or other felony . . . for which the maximum sentence which may be imposed exceeds twenty years. . . ."

time for his arrest, his confession should have been suppressed. We do not agree.

It is well settled that the fourth amendment[7] requires that a confession which is the product of an arrest or a detention made without probable cause must be excluded from evidence. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); see also *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). We previously have held that the trial court must make two determinations in assessing the admissibility of a confession made during custodial interrogation following a claimed warrantless arrest: (1) whether or not the defendant has been seized; and (2) whether or not there was probable cause for the seizure. *State v. Acquin*, 187 Conn. 647, 651, 448 A.2d 163 (1982), cert. denied, 463 U.S. 1229, 103 S.Ct. 3570, 77 L.Ed.2d 1411 (1983); *State v. Ostroski*, 186 Conn. 287, 290, 440 A.2d 984, cert. denied, 459 U.S. 878, 103 S.Ct. 173, 74 L. Ed.2d 142 (1982). Because the trial court expressly found that there was no probable cause for the defendant's arrest prior to his making inculpatory statements, only the first question is at issue in this appeal.

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[7] The fourth amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"[A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *State v. Acquin*, supra, 655. We have held that " '[t]o constitute an arrest, there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained.' " *State v. Derrico*, 181 Conn. 151, 159, 434 A.2d 356, cert. denied, 449 U.S. 1064, 101 S.Ct. 789, 66 L.Ed.2d 607 (1980), quoting *Jenkins v. United States*, 161 F.2d 99, 101 (10th Cir. 1947); see also *State v. Magnotti*, 198 Conn. 209, 212-13, 502 A.2d 404 (1985).

Voluntary interactions between the police and citizens do not implicate fourth amendment protections. *United States v. Webster*, 750 F.2d 307, 320 (5th Cir. 1984), cert. denied, 471 U.S. 1106, 105 S.Ct. 2340, 85 L.Ed.2d 855 (1985). A person is not arrested nor seized under the fourth amendment if he freely chooses to enter into or continue an encounter with the police. *United States v. Brunson*, 549 F.2d 348, 357 (5th Cir. 1977), cert. denied, 434 U.S. 842, 98 S.Ct. 140, 54 L.Ed.2d 107 (1977). Police officers do not violate an individual's constitutional rights by approaching him, by asking him if he is willing to answer some questions, by putting questions to him if he is willing to listen, or by offering into evidence in a criminal prosecution his voluntary answers to such questions. *Florida v. Royer*, 460 U.S 491, 497, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *State v. Brown*, 199 Conn. 47, 52-53, 505 A.2d 1225 (1986).

A finding of fact will not be overturned on appeal unless it is clearly erroneous. *State v. Pittman*, 209 Conn. 596, 606, 553 A.2d 155 (1989); *State v. Young*, 191 Conn. 636, 652, 469 A.2d 1189 (1983); see Practice Book § 4061. Where a constitutional issue turns upon a factual finding, however, this court has applied a stricter standard of review of the factual finding. "The issue is factual, but our usual deference to the finding of the trial court on questions of this nature is qualified by the necessity for a scrupulous examination of the record to ascertain whether such a finding is supported by substantial evidence. *Columbe v. Connecticut*, 367 U.S. 568, 605, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961)." *State v. Frazier*, 185 Conn. 211, 219, 440 A.2d 916 (1981), cert. denied, 458 U.S. 1112, 102 S.Ct 3496, 73 L.Ed.2d 1375 (1982).

We conclude, after a scrupulous examination of the record, that the evidence presented during the suppression hearing was sufficient to support the trial court's conclusion that the defendant was neither under arrest nor seized for constitutional purposes until after he voluntarily gave the inculpatory statements to the police. As factfinder, the trial court was entitled to accept the uncontroverted testimony of the three detectives who traveled to Bozzuto's that the defendant was not a suspect at that time;[8] that his decision to accompany the police was

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[8] Testimony elicited at the suppression hearing and at trial indicates that the police originally suspected the landlord, Mitchell Stevenson, of the murder. Stevenson was questioned a number of times on the day of the crime, including twice at the police station, and was told that he was a suspect. He was fingerprinted, strip searched, and his apartment was searched.

completely voluntary; that he expressed no reservations about going to the police station or answering questions about the homicide; that he was informed that he was not under arrest and could leave if and when he chose to; that before leaving Bozzuto's he returned to his work area unescorted in order to retrieve his backpack, which the police did not search; that he traveled to New Haven in an unmarked car that did not contain a restraining cage and which could be unlocked from the inside; that he was not physically or verbally restrained or handcuffed; and that he never requested to go home. See, e.g., *United States v. Mendenhall,* supra.

Although the defendant was in the company of one or two detectives until midnight, when his confession was recorded, the testimony indicates that the actual interview did not begin until sometime between 9 and 9:30 p.m. and that the defendant first implicated himself shortly after 10 p.m.[9] Also, the issuance of *Miranda* warnings as a cautionary measure does not mean that the defendant had been arrested. See, e.g., *Government of Virgin Islands v. Commissiong,* 698 F. Sup. 604, 612 (D. Virgin Islands 1988).

The trial court could reasonably have concluded that the defendant's contact with the police was voluntary and did not amount to a seizure or arrest prior to the time he made the inculpatory statements. This conclusion is in accord with recent decisions of this court containing similar factual backgrounds. See *State v. Young,* supra; *State v. Acquin,* supra; *State v. Derrico,* supra.

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[9] See footnote 4, supra.

II

The defendant next argues that his constitutional rights to confrontation, compulsory process and due process were violated when the trial court admitted the victim's autopsy report into evidence, as a business record, through the testimony of a pathologist who was not present at the autopsy, after the trial court had denied the defendant's request for a continuance. We do not agree.

To gain admission of a document under the business record exception to the hearsay rule,[10] the proponent

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[10] "[General Statutes] Sec. 52-180. ADMISSIBILITY OF BUSINESS ENTRIES AND PHOTOGRAPHIC COPIES. (a) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter.

"(b) The writing or record shall not be rendered inadmissible by (1) a party's failure to produce as witnesses the person or persons who made the writing or record, or who have personal knowledge of the act, transaction, occurrence or event recorded or (2) the party's failure to show that such persons are unavailable as witnesses. Either of such facts and all other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of the evidence, but not to affect its admissibility.

"(c) Except as provided in chapter 3, if any person in the regular course of business has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the

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must show that (1) the document was made in the regular course of business, (2) it was the regular course of business to make such a record, and (3) the record was made

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regular course of business has caused any or all of them to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is otherwise required by statute. The reproduction, when satisfactorily identified, shall be as admissible in evidence as the original in any judicial or administrative proceeding, whether the original is in existence or not, and an enlargement or facsimile of the reproduction shall be likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile shall not preclude admission of the original.

"(d) The term 'business' shall include business, profession, occupation and calling of every kind."

Autopsy reports are also admissible pursuant to General Statutes § 19a-412, which provides: "Formerly Sec. 19-53(6). RECORDS AS EVIDENCE. The records of the office of the chief medical examiner, or transcripts thereof certified by the chief medical examiner or his authorized representative, shall be subject to subpoena and shall be admissible in evidence in any court in the state in the same manner and subject to the same conditions as hospital records as provided in section 4-104, except that the findings or conclusions of the chief medical examiner, his deputy, an associate medical examiner or an assistant medical examiner as to the cause or circumstances of death, other than those set forth in the death certificate or the autopsy report, and statements by witnesses or other persons and conclusions upon extraneous matters shall not be admissible."

when the act, transaction or event occurred, or shortly thereafter. *Emhart Industries, Inc. v. Amalgamated Local Union 376, U.A.W.*, 190 Conn. 371, 383-84, 461 A.2d 422 (1983). To qualify a record as a business entry, a witness must testify to the three requirements, but the witness need not have been the entrant himself or even in the employ of the business when the entry was made. See, e.g., *Baumert-Moran Sales Co. v. Red Bird Truck Rental Corporation*, 149 Conn. 42, 45, 175 A.2d 189 (1961); *D'Amato v. Johnston*, 140 Conn. 54, 62, 97 A.2d 893 (1953).

"[T]he essential hallmark of admissibility under § 52-180 is the trustworthiness of the document . . . ." *Jefferson Garden Associates v. Greene*, 202 Conn. 128, 141, 520 A.2d 173 (1987). Kanfer testified that the autopsy report was a standard report, made in the regular course of business soon after the autopsy was completed, and that it was the regular course of business to keep the report on file at the medical examiner's office. In light of Kanfer's testimony and the nature of the document itself, which is a report derived from established routine procedures designed to record objective facts and observations, we conclude that the trial court did not abuse its discretion in admitting the autopsy report as a business record.

The defendant further argues, however, that even if the admission of the autopsy report complied with the statute, its admission through the testimony of Kanfer violated his constitutionally protected confrontation rights.[11] Although the confrontation clause and the

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[11] The sixth amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy

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hearsay rule protect similar values, the two are not coextensive. It is well established, however, that hearsay evidence may be admitted without violating the confrontation clause where the evidence falls within a firmly rooted hearsay exception. See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 63-66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); *State v. Cosgrove*, 181 Conn. 562, 571-72, 436 A.2d 33 (1980). "Firmly rooted exceptions to the hearsay rule do not violate the confrontation clause." *United States v. Baker*, 855 F.2d 1353, 1360 (8th Cir. 1988), cert. denied, ___ U.S. ___, 109 S. Ct. 2072, 104 L. Ed. 2d 636 (1989). The precepts of confrontation are satisfied when an out of court statement complies with the conditions of a well established exception to the hearsay rule. *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987).

Other courts have specifically rejected confrontation claims involving autopsy reports in factual backgrounds similar to that presented in this appeal. See, e.g., *Montgomery v. Fogg*, 479 F. Sup. 363, 369-71 (S.D.N.Y. 1979); *Collins v. State*, 267 Ind. 233, 235-36, 369 N.E.2d 422, (1977). Also, in *State v. Cosgrove*, supra, we rejected similar claims in an analagous context. In *Cosgrove*, a toxicological report on seized marijuana was admitted as a

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the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

business record. The defendant in that case argued that admission of the report violated his right of confrontation because the report contained the statements of a chemist who was not called to testify. In reaching our conclusion that no violation of the defendant's confrontation right had occurred, we focused on whether such reports were sufficiently trustworthy and reliable to be placed before the jury without confrontation of the declarant. Id., 569-78; see also *Reardon v. Manson*, 806 F.2d 39 (2d Cir. 1986), cert. denied, 481 U.S. 1020, 107 S. Ct. 1903, 95 L. Ed. 2d 509 (1987); *State v. King*, 187 Conn. 292, 309-15, 445 A.2d 901 (1982).

The same factors that supported the reliability of the toxicological report admitted in *Cosgrove* are largely present in this case.[12] An autopsy report derives from well

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[12] The factors that we identified as determinative in the question of whether a toxicological report is sufficiently reliable and trustworthy to be admitted without confrontation of the declarant included: (1) a toxicological report is the record of the results of well recognized chemical and laboratory procedures; (2) it contains a record of objective facts and not only opinion; (3) the report is the record of routine tests performed hundreds or thousands of times a year, and in light of their frequency are so generally considered reliable that they are normally undisputed; (4) the chemist reporting the facts would have no motive to falsify the records but would be under a strict duty as an employee and a scientist to make an accurate report to preserve her job and the integrity of the toxicological laboratory; (5) the chemist owes no allegiance per se to the state's attorney; and (6) while such tests are not purely mechanical, they fall well within the category of those types of tests whose reliability has been consistently demonstrated and generally accepted, and do not contain the degree of subjectivity that would warrant production of the declarant. *State v. Cosgrove*, 181 Conn. 562, 575-77, 436 A.2d 33 (1980).

recognized, routine procedures, and records objective facts. These procedures are performed hundreds of times each year, and in light of their frequency, are so generally considered reliable that they are normally undisputed. The pathologist performing the autopsy, Shah, had no motive to falsify her findings and owed no special allegiance to the state's attorney. Shah, as a physician and a state employee, has a professional duty to report the results of her work in an accurate and truthful manner. See *State v. Cosgrove*, supra, 575-77. Like a toxicology report, an autopsy report is essentially a factual report limited to objective, physical observations. As such, it contains sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. See *Montgomery v. Fogg*, supra, 370.

The state was not obligated to demonstrate the unavailability of Shah. Section 52-180 expressly provides that the proponent of the business record need not produce that person who made the record or show that the person is unavailable. *State v. Jeustiniano*, 172 Conn. 275, 280, 374 A.2d 209 (1977). Unavailability need not always be demonstrated to satisfy the confrontation clause. *State v. Vessichio*, 197 Conn. 644, 657-60, 500 A.2d 1311 (1985), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986).

III

The defendant's final contention is that the trial court's denial of his request for a continuance, until Shah returned from India or until the defendant could retain his own pathologist to examine the report, violated his

rights to compulsory process or due process. The decision to grant a request for a continuance lies within the sound discretion of the trial court and will not be disturbed on appeal absent clear abuse of that discretion. *State v. Aillon*, supra, 394; *State v. Stanley*, 197 Conn. 309, 311-12, 497 A.2d 46 (1985). The defendant bears the heavy burden of proving that the trial court acted arbitrarily and substantially impaired the defendant's ability to defend himself. *State v. Beckenbach*, 198 Conn. 43, 47-48, 501 A.2d 752 (1985).

The defendant here fails to carry this burden. There is nothing in the record to indicate that Shah would have given any testimony favorable to the defendant. See *State v. Aillon*, supra, 396. Kanfer, a qualified pathologist who had performed over 800 autopsies, was present in court to explain fully the meaning of the autopsy report and was subject to cross examination by the defendant. Also, the defendant had possession of a copy of the autopsy report for more than two months and had ample opportunity to review its content and retain an expert witness to explain its content, if he so desired. Furthermore, the defendant requested the continuance one day after the start of trial. The trial court has a responsibility to avoid unnecessary interruptions, to maintain the orderly procedure of the court docket, and to prevent any interference with the fair administration of justice. See *State v. Bethea*, 167 Conn. 80, 83, 355 A.2d 6 (1974). Based upon the record it cannot be said that the trial court abused its discretion or deprived the defendant of his constitutional rights to compulsory process or due process of law.

There is no error.

In this opinion the other justices concurred.

STATE OF CONNECTICUT

SUPREME COURT

NO. 13672

STATE OF CONNECTICUT

v.

KENNETH DAMON : APRIL 12, 1990

ORDER

THE MOTION OF THE DEFENDANT, FILED MARCH 14, 1990, FOR REARGUMENT OR RECONSIDERATION, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,

/s/ Francis J. Drumm
CHIEF CLERK

NOTICE SENT: 4-12-90
GEOFFREY MARION, D.A.S.A.
JOHN R. WILLIAMS
CLERK, NEW HAVEN J.D.
(CR6-277707)
HON. JOSEPH J. PURTILL
REPORTER OF JUDICIAL DECISIONS